

DANIEL G. SHILLITO
Regional Solicitor
AMY L. AUFDEMBERGE
Assistant Regional Solicitor
Office of the Regional Solicitor
United States Department of the Interior
2800 Cottage Way, E-1712
Sacramento, California 95825

Telephone: (916) 978-5688
Facsimile: (916) 978-5694

Attorneys for the United States Bureau of Reclamation

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of:)
)
Order WR 2006-0006)
Joint Cease and Desist Order (CDO) against the)
United States Bureau of Reclamation and)
the California Department of Water Resources)

**UNITED STATES BUREAU OF RECLAMATION'S PETITION FOR
RECONSIDERATION**

Pursuant to California Water Code § 1122, the United States Bureau of Reclamation (USBR) hereby petitions the State Water Resources Control Board (SWRCB or "the Board") to reconsider its Order WR 2006-0006, adopting a cease and desist order (CDO) against USBR and the California Department of Water Resources (DWR).

PETITION FOR RECONSIDERATION

Under the California Code of Regulations, title 23, section 768, any interested person may file a petition for reconsideration upon any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

Reclamation believes that reconsideration is warranted under, at least, (a), (b), and (d), above.

A. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing.

Reclamation believes that there are irregularities in the ruling and abuses of discretion which have prevented Reclamation from having a fair hearing, and which warrant the Board's reconsideration and withdrawal of the CDO against Reclamation. Reclamation finds that the following are irregularities in the proceedings or ruling, and abuses of discretion:

1. Under "2.3 Conditions of Permits and License Requiring 0.7 EC", the Board finds that, "USBR and DWR are each fully responsible for meeting certain water quality objectives, including the interior southern Delta salinity objectives, as described in Table 2 of D-1641." The Board repeats this finding throughout the CDO, most notably on page 26, under Conclusions, paragraph 1. The Board lacks authority to make this finding in the CDO proceeding. The CDO hearing was not a proceeding to assign responsibility to comply with the SWRCB's 1995 Water Quality Control Plan (WQCP) objectives.¹

¹Assignment of responsibility must be based on factual findings, not unfounded declarations made following an enforcement action proceeding.

Rather, the CDO hearing, as noticed by the Board, was for the purpose of, among others, determining whether the Board should issue a CDO to USBR and DWR to enforce, not modify D-1641, and if so, what modifications should be made to the draft CDO, and what the bases for such modifications might be. USBR had no notice that the Board would be making findings regarding the assignment of responsibility to meet the interior south Delta water quality objectives.

The Board's finding that USBR and DWR are each "fully responsible" for salinity in the south Delta is in direct conflict with D-1641 and the evidence in this matter. D-1641, at p. 86-87 states as follows:

10.3 Responsibility for Southern Delta Salinity Objectives Downstream of Vernalis

10.3.1 Causes of Salinity Concentrations Downstream of Vernalis

Water quality in the southern Delta downstream of Vernalis is influenced by San Joaquin River inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity. (R.T. p. 3668; DWR 37, p. 8) The salinity objectives for the interior southern Delta can be implemented by providing dilution flows, controlling in-Delta discharges of salts, or by using measures that affect circulation in the Delta.

* * *

Even when salinity objectives are met at Vernalis, the interior Delta objectives are sometimes exceeded. (R.T. p. 3677; SWRCB 1e, Figures [IX-19]-[IX-26]; SWRCB 76.) Exceedance of the objectives in the interior Delta is in part due to water quality impacts within the Delta from in-Delta irrigation activities. (R.T. p. 7794) SDWA argues that it does not add to the salt load; however, agricultural activity does increase the salinity of the water in the Delta channels. (R.T. pp. 3836-3847.) Irrigators within the Delta could implement water management measures as a means of controlling salinity impacts within the Delta channels. (RT pp. 7869, 7870.)

Nowhere in D-1641 does the Board assign to either USBR or DWR the full responsibility to meet the southern Delta salinity standards below Vernalis. In fact, on page 88 of D-1641, the Board states that, "The DWR and the USBR are **partially responsible** for salinity problems in the southern Delta because of hydrologic changes that are caused by

export pumping.”

Because the Board finds USBR and DWR to be only partially responsible for salinity conditions in the south Delta, the Board imposed on USBR and DWR the responsibility to meet an objective of 1.0 EC (measured as a 30-day running average) during April – August, instead of the more restrictive 0.7 EC adopted in the 1995 WQCP², and included a provision that states that an exceedance of the EC objective at the three interior stations below Vernalis would not be a violation of the permit terms and conditions *per se*. Rather, D-1641 provides that any exceedance would be evaluated to determine whether the “noncompliance” is the result of actions beyond the control of USBR or DWR. Enforcement proceedings, under D-1641, occur only if an exceedance is found to be within the control of USBR or DWR. Never did the Board intend for USBR or DWR to be fully responsible for the south Delta salinity standards below Vernalis under any and all circumstances.

This is because neither USBR nor DWR are solely responsible for salinity degradation below Vernalis, as acknowledged by the Board, and because the Board can only hold the Projects responsible for “reasonable” objectives. At page 10 of D-1641, the Board found that, “The benefits of the barriers could be achieved by other means, such as increased flows through the southern Delta and export restrictions, but these measures could result in an **unreasonable use** of water and a significant reduction in water supplies

²The Board imposed the 0.7 EC standard against the Projects merely as a “hammer clause” to force construction of permanent operable barriers in the interior Delta. When the barriers were not in place by April 1, 2005, the 1.0 EC objective was replaced by the 0.7 EC objective, as a punitive measure. Under D-1641, when the barriers are in place in the future, the objective will revert to 1.0 EC. USBR’s position is that even if the California courts find fault with an irregularity between the 1995 WQCP and D-1641 objectives, the terms of D-1641 cannot be changed absent appropriate procedures, as directed by the California courts in the State Water Resources Control Board Cases of 2006.

south and west of the Delta.” (emphases added).³ The Board has never made a finding that imposition of the 0.7 EC objectives solely and fully against the Projects is a reasonable use of water. The Board cannot amend USBR’s water rights through issuance of a CDO and modify the assignment of responsibility described in D-1641.⁴

The Board’s finding in the CDO that USBR and DWR are fully responsible for meeting south Delta salinity objectives is also inconsistent with the evidence presented at the CDO hearing. In its findings supporting the CDO, the Board finds that, “Salinity levels in the southern Delta are influenced by San Joaquin River inflow; tidal action; SWP and CVP water export facilities (primarily water levels and circulation), local pump diversions; agricultural and municipal return flows; channel capacity; and upstream development. (PT 5, pp. 87-89; DWR 21, p. 1).” CDO at p. 5. The Board’s finding on page 7 of the CDO, that USBR and DWR are each fully responsible for meeting interior southern Delta salinity objectives, is in direct contravention with these factual findings made by the Board. Such contravention is a serious irregularity in the order and an abuse of the Board’s discretion. It is even more troublesome that **the Board has never concluded that use of CVP water, to correct salinity degradation below Vernalis caused by others, is in the public interest, or is a reasonable use of water under the California constitution, the California Water Code, or D-1641.**⁵

2. On page 8 of the CDO, the Board has interjected Figure 2, entitled, “History of

³ Yet these are the very “corrective actions” the Board now imposes on USBR and DWR – without any analysis of the “reasonableness” of using CVP water to meet standards below Vernalis. This analysis has not been done by the Board to date, and the Board did not analyze the impacts of making USBR fully responsible for 0.7 EC below Vernalis in its environmental impact report (EIR) supporting D-1641. In that document, the Board only analyzed the impacts of USBR meeting standards at Vernalis.

⁴The Court of Appeal of California, Third Appellate District, has issued an order in State Water Resources Control Board Cases, 2006 Cal. App. LEXIS 171 (February 9, 2006) requiring the superior court to command “the Board to commence further appropriate proceedings to either assign responsibility for meeting the ... southern Delta salinity objectives or to modify [this] objective[.]”

⁵ California Constitution Article X, Section 2, Cal. Water code § 100, and D-1641 at p. 10.

Southern Delta Salinity Issues.” The table starts with 1958 and goes on for two pages, ending in March 2000. None of this “History” was introduced as evidence at the hearing, was not cross-examined by any party, and cannot now be relied upon by the Board to support its CDO. Figure 2 is extra-record evidence and wholly improper for a fair procedure.

More troublesome is that on page 9 of the CDO, under “December 1999 and March 2000.” The Board interjects extra-record statements of its own making purporting to be historical “fact.” However, the Board attempts to re-write history and states, “The State Water Board assigned sole responsibility to USBR for meeting the Vernalis EC objectives and DWR and USBR for meeting the EC objectives at Brandt Bridge, Old River near Middle River, and Old River at Tracy Road.” Again, there is no such finding in D-1641. Because all of Figure 2 has been interjected by the Board and was not introduced as evidence at the hearing, USBR has had no opportunity to cross-examine or otherwise determine the veracity of all of the many statements set forth by the Board in Figure 2. Its inclusion as a finding of the CDO process is unwarranted and unfair to all of the parties.

3. The ruling is irregular at pages 19 and 20. The Board sets forth its interpretation of the important provision in D-1641 that requires a finding that a noncompliance is the result of actions within the control of USBR before an enforcement action will be taken. There is a difference between a noncompliance or an exceedance, and a violation. A noncompliance or an exceedance of an objective may or may not be a violation. A violation is a factual and legal conclusion following an appropriate proceeding. Only the Board can determine whether a violation exists, and then only after an appropriate enforcement proceeding before the Board. However, the Board states in

the CDO that, “The meaning of the condition . . . is that if DWR and USBR are in violation of the condition, one of the matters to be considered by the Executive Director in recommending whether to prosecute is the extent to which the noncompliance results from actions that are beyond the control of DWR and USBR.” This interpretation does not comport with the plain meaning of the statement in D-1641, that:

If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate **or** the noncompliance is the result of actions beyond the control of Permittee. (Emphasis added).

Obviously, the “or” makes it clear that enforcement actions against the Permittee are not contemplated by the Board if a noncompliance is the result of actions beyond the control of the Permittee. The Board’s interpretation now that this provision states that any and all exceedances are violations *per se*, and that USBR will be subject to enforcement action even in circumstances where an exceedance or noncompliance is beyond its control, is disingenuous, at best. This is not what the words say. The Board cannot now re-write this D-1641 provision through the CDO proceeding, and cannot further complain that USBR did not seek reconsideration of this point following adoption of D-1641 in 2000 (see CDO at p. 21). The answer to that quandary is simple: USBR had no idea that this is how the Board would interpret the plain words of this provision in 2006.

Through the CDO proceeding, the Board inappropriately attempts to modify the provisions of D-1641 in at least three important ways: the Board now requires corrective actions when USBR projects a potential exceedance, irrespective of whether the exceedance is within the control of USBR (CDO at p. 30); the Board re-writes the provision in D-1641 requiring a violation to be predicated only upon a finding that an exceedance is within the control of either USBR or DWR (Id.); and the Board finds that

USBR and DWR are fully responsible for the interior south Delta salinity standards. All of these inappropriately amend the terms of D-1641, which were not at issue in the CDO hearing. USBR and DWR have been issued a water right order, D-1641, following a hearing on the water quality issues addressed in D-1641. If the terms of D-1641 are to be changed, USBR and DWR are entitled to a hearing on these issues. It is USBR's position that the CDO is unnecessary, unwarranted, and potentially unenforceable as an attempt to alter the provisions in D-1641, without undertaking appropriate proceedings. The CDO, therefore, is an abuse of the Board's discretion.

B. The Decision or Order is Not Supported by Substantial Evidence.

Reconsideration is warranted by the Board because the CDO is not supported by substantial evidence. Many of USBR's evidentiary concerns have been included in its Closing Brief and will not be repeated at length here. USBR remains concerned, as the Board has also concluded and admitted, that the Prosecution Team failed to consider future hydrology, reservoir conditions, and USBR's and DWR's ability to control these conditions, when it issued the draft CDOs (see CDO at p. 21). Instead, the Board relies on historic EC data, and letters written to the Board accompanying temporary urgency and long-term petitions to delay the effective date of the 0.7 EC objective, with cause.

Many of the evidentiary concerns have to do with the Board's issuance of a CDO for a "threatened violation" in this circumstance. For instance, the problem with using historical EC data to support the CDO for a threatened violation, is that the Board has acknowledged, for years, that the interior south Delta salinity standards are exceeded by factors beyond the control of the Projects. The Board even finds in D-1641 that, "Even when salinity objectives are met at Vernalis, the interior Delta objectives are sometimes exceeded." (D-1641, p. 87), and that, "The construction of permanent barriers alone is not

expected to result in attainment of the water quality objectives.” (D-1641, p. 88). The Board has no reason to issue a CDO to USBR or DWR for a situation it has clearly already acknowledged exists. Statements in USBR’s and DWR’s cover letters to the temporary and long-term petitions, the primary evidence relied on in this case, merely mirror what the Board has itself acknowledged. The purpose of the long term petitions are to implore the Board as to the reasonableness of a standard it acknowledges is exceeded for reasons beyond the control of the Projects, when salinity standards are met at Vernalis,⁶ and even if permanent operable barriers were in place.

The Board has acknowledged that other influences, and other parties, cause degradation below Vernalis. The Board has not, however, determined whether the use of CVP water to remedy this degradation is in the public interest or a reasonable use of water, or whether the objectives are reasonable, knowing it cannot always be met, even when the permanent barriers are in place. The reasonableness of the Board’s CDO is further in question because the Board has also not taken any appropriate remedial measures against others whose actions degrade salinity below Vernalis.⁷ The Board has chosen instead to delete these very salinity objectives from the City of Manteca’s direct discharge permit. See WQO 2005-0005.

Another problem with the “threatened violation” theory is that enforcement should only occur if it is determined that a noncompliance is within the control of USBR. The implementation of that provision means that the 0.7 EC objective is only violated if an exceedance is within the control of USBR. This provision is not written out of USBR’s and DWR’s water right permits simply because the Board is taking action using

⁶ Vernalis is known to be the end of the San Joaquin River basin, and beginning of the interior Delta.

⁷ By USBR’s assessment, those who may be responsible for further degradation of salinity below Vernalis, include, but are not limited to: The City of Manteca, The City of Tracy, South Delta Water Agency, and the Central Delta Water Authority.

a “threatened violation” theory. Because the Board assigned only partial responsibility in D-1641 to USBR and DWR, the provision makes sense: USBR and DWR can only be in violation of the objective if an exceedance is within their control. By the Board’s own words, then, the Board lacks the authority to sanction USBR or DWR for a “threatened violation.” There can be no control analysis of a future, hypothetical exceedance. The Board cannot get to a violation under the provision in D-1641 absent facts showing an exceedance and an analysis thereof. Without the ability to prove a future violation (i.e., a noncompliance that is within the control of USBR or DWR), the Board cannot, on this evidence, find a future “threatened violation.” The CDO for a “threatened violation,” therefore, is not supported by substantial evidence.

At most, the evidence could be interpreted as showing the potential for future exceedances, a situation of which the Board has long been aware, and has fully acknowledged. Again, the Board has not taken any remedial actions against those who are responsible for degradation below Vernalis, even though they are clearly aware of the compliance issues in this area. The waiver to the City of Manteca shows that the Board’s plans for the area are quite the opposite: instead the Board will delete salinity requirements for direct dischargers who contribute to salinity in the south Delta. WQO 2005-0005 at p. 22.

C. Error in Law.

The Board’s CDO is predicated on an error in law, and therefore reconsideration and withdrawal of the CDO against USBR is warranted. The Board has not performed any environmental analysis under the California Environmental Quality Act (CEQA) for making USBR fully responsible for the 0.7 EC standard. Neither has the Board analyzed under CEQA the impacts of the corrective actions ordered under the CDO at paragraph 4,

p. 30, which include: additional releases from upstream CVP facilities or south of the Delta SWP or CVP facilities, modification in the timing of releases from Project facilities, reduction in exports, recirculation of water through the San Joaquin River, purchases or exchanges of water under transfers from other entities, modified operations of temporary barriers, reductions in highly saline drainage from upstream sources, or alternative supplies to Delta farmers (including overland supplies).

Page VI-13 of the 1999 Final Environmental Impact Report for Implementation of the 1995 Bay/Delta Water Quality Plan states:

The model is not operated to require the release of higher dilution flows to meet salinity objectives at the other three southern Delta stations (Brandt Bridge, Old River at Tracy Bridge, and Old River near Middle River). Consequently, salinity at these stations exhibit a pattern similar to Vernalis salinity, but the objectives at these locations are exceeded more often than the Vernalis objectives, especially under dry conditions, because of the local water use and drainage patterns.⁸

This shows, as USBR has previously contended, that the Board never intended to make the USBR fully responsible for south Delta salinity standards under any circumstance, including the circumstance where degradation is caused by others below Vernalis. If that were the Board's intention in D-1641, D-1641 would have found, and supported by facts, that USBR and DWR were fully responsible for those objectives, and these corrective actions would have been appropriately analyzed in the EIR for D-1641. In addition, the Board would not have made the finding in D-1641, at page 10, that some of these very actions may cause an unreasonable use of water. If the Board had intended to make USBR fully responsible for the 0.7 EC standard below Vernalis, in order to mitigate degradation caused by others, it would have appropriately analyzed and balanced

⁸ See also Figures IX-19 and 23, pp. IX-32 – 33.

the reasonable use of water for this purpose under CEQA, the California Water Code, and the California constitution. The Board has made no such analysis.

USBR believes that any and all of the above show abuses of discretion, lack of substantial evidence and errors in law that support the Board's giving serious reconsideration to the CDO, and warrant the Board's withdrawal of the CDO.

Respectfully submitted on this 17th day of March, 2006,

Amy L. Aufdemberge
Assistant Regional Solicitor
Attorney for USBR

CERTIFICATE OF SERVICE

RE: ORDER WR 2006-006

I, the undersigned, declare that:

I am a citizen of the United States, over the age of eighteen, and I am not a part of this litigation. On March 17, 2006, I served the petition entitled

**A UNITED STATES BUREAU OF RECLAMATION=S PETITION FOR
RECONSIDERATION @**

by placing a true copy enclosed in a sealed envelope via certified mail and email at Sacramento, California, addressed as follows:

Lewis Moeller
Hearings Unit
States Water Resources Control Board
PO Box 2000
Sacramento, CA 95812-0100

klanouette@olaughlinparis.com
Thomas J. Shepard, Sr.
PO Box 20
Stockton, CA 95201
tshepard@neumiller.com

Cathy Crothers, Senior Staff Counsel
Department of Water Resources
1416 Ninth Street, Room 1118
Sacramento, CA 95814
crothers@water.ca.gov

Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, 18th Floor
Sacramento, CA 95814
JRubin@Diepenbrock.Com

Erin K. L. Mahaney
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
emahaney@waterboards.ca.gov

John Herrick, Esq.
South Delta Water Agency
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Jherrlaw@aol.com

Dante John Nomellini, Esq.
Nomellini, Grilli & McDaniel
PO Box 1461
235 East Weber Avenue
Stockton, CA 95201
ngmplcs@pacbell.net

Michael Jackson
PO Box 207
429 W. Main Street
Quincy, CA 95971
mjatty@sbcglobal.net

Dante John Nomellini, Esq.
Nomellini, Grilli & McDaniel
P.O. Box 1461
235 East Weber Avenue
Stockton, CA 95201
cpanelson@prodigy.net

Clifford W. Schulz
Kronich, Moskovitz, Tiedemann & Girard
400 Capitol Mall, Suite 2700
Sacramento, CA 95814
cschultz@kmtg.com

Tim O=Laughlin
O=Laughlin & Paris LLP
2571 California Park Drive, Suite 210
Chico, CA 95928

Gary Bobker, Program Director
The Bay Institute
500 Palm Drive, Suite 200
Novato, CA 94949

Patrick Porgans
Patrick Porgan & Assoc., Inc.
PO Box 60940
Sacramento, CA 95860

Paul R. Minasian
PO Box 1679
Oroville, CA 95965
pminasian@minasianlaw.com
msexton@minasianlaw.com
dforde@minasianlaw.com

Karna E. Harrigfeld
Herum Crabtree Brown
2291 W. March Lane, Suite B100
Stockton, CA 95207
kharrigfeld@herumcrabtree.com
jzolezzi@herumcrabtree.com

David J. Guy, Executive Director
Northern California Water Association
455 Capitol Mall, Suite 335
Sacramento, CA 95814
dguy@norcalwater.org

Arthur F. Godwin
700 Loughborough Drive, Suite D
Merced, CA 95348
agodwin@mrgb.org

Tina R. Cannon
CA Department of Fish and Game
1416 9th Street, Suite 1341
Sacramento, CA 95814
tcannon@dfg.ca.gov

I certify that the foregoing is true under penalty of perjury. Executed this 17th day of March, 2006, at Sacramento, California.

James L. Hines
Secretary